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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* INTEL CORPORATION IN PARTIAL SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* INTEL CORPORATION IN PARTIAL SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Intel Corporation ("Intel") submits this brief *amicus curiae* in partial support of Petitioners pursuant to Rule 37 of the Rules of this Court.[1] Founded in 1968, Intel introduced the world's first microprocessor. Intel develops technology and supplies the computing and communications industries with

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief. Letters of Consent have been filed with the Clerk of the Court.

the digital building blocks to create computers, servers, networking, and communications products. Intel is the world's largest semiconductor company and a major global Internet technology provider. As a technology company, Intel has a significant interest in strong intellectual property protection and respects and benefits from intellectual property rights and laws. At the same time, as a company participating in the effort to improve computing, networking, and communication, and to promote discourse, learning, and progress, Intel recognizes the importance of a constantly-enriched and refreshed public domain—an essential element of the progress that the framers of the Constitution sought to stimulate.

As a leading technology provider to the "Information Revolution," Intel is in a unique position to provide insight on the value of a vibrant and healthy public domain, which was plainly intended by the Constitution and is more important today than ever. Intel submits that for the first time in history the rich promise of the public domain is within the grasp of entire generations of new creators, due to the liberating power that digital computing, networking, and communications technologies deliver to the average citizen.

SUMMARY OF ARGUMENT

Intel offers no view on the appropriateness of the specific copyright term extension that is the subject of Petitioner's complaint, but believes that it would be important for this Court to provide guidance on the extent to which Congress may extend copyright protection through incremental extensions of the copyright term. The Copyright Clause of the Constitution strikes a careful balance between creating incentives and rewards for copyright owners and providing benefits to the public, and, as a creator, owner,[2] and user of

[2] As an owner of copyrights, Intel obviously benefits from copyright term extensions. However, as explained in Section III, Intel has a broader interest in this issue.

copyrighted works and other intellectual property, Intel respects and relies on this balance. Intel understands, however, that repeated extensions of the copyright term—even if each such extension is itself only incremental and limited in time—can eventually undermine the delicate balance contemplated by the framers. As a participant in efforts to promote the progress of science, innovation, and creativity, Intel has the opportunity to observe the importance of a robust and constantly-refreshed public domain.

The availability of rich new public domain content inspires new creation, innovation, and progress. At no time in history has the promise of the public domain been more tangible than today, made possible through digital technologies available to all. The capacity and accessibility of connected computing and networking technologies, the creative tools made possible by digital computing, and the eventual software contributions to an already engaged open source community,[3] give unprecedented new meaning to the phrase "public domain." While it is inherently difficult to determine where to draw the line, Intel urges the Court to evaluate incremental copyright term extensions with an understanding that digital computing, networking, and communications technologies have created an historic opportunity to give the phrase "public domain" new meaning.

ARGUMENT

Since 1962, Congress has extended the term of copyright protection eleven times.[4] The Sonny Bono Copyright Term

[3] The "open source" movement created the Linux operating system and a host of related open source software tools and applications through a "community effort" that makes software code publicly available and freely accessible.

[4] *See* 17 U.S.C. § 304 (2001). *See also* Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No.

Extension Act of 1998 (the "CTEA"), which added twenty years to the term of protection, is the most recent extension.[5] The copyright term now has increased from a maximum possible term of 28 years under the first copyright law in the United States to a term of 95 years or more, depending on the life span of the author.[6] Intel recognizes that (i) the Constitution gives Congress discretion in determining the length of the copyright protection term, (ii) U.S. artists and companies have legitimate economic interests in protecting and preserving their intellectual property, and (iii) the nature of the global economy supports a degree of uniformity between U.S. copyright terms and those of their foreign counterparts. In this context, Intel offers no opinion on the validity of the CTEA itself. Nevertheless, Congress's discretion *is* limited by the Copyright Clause of the Constitution to preserve the careful balance envisioned and established by the framers. Each time that Congress extends a copyright term, it has a direct and immediate impact on both the amount of new material entering the public domain and the age and relevance of new public domain material. Each term extension thus diminishes the value of the public domain.

91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, Title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 94-553, 90 Stat. 2753 (1976); Pub. L. No. 102-307, Title I, § 102(a), (d), 106 Stat. 264, 266; (1992); Pub. L. No. 105-80, § 12(a)(9), 11 Stat. 1535 (1997); Pub. L. No. 105-298, Title I, § 102(d)(1), 103, 112 Stat. 2827, 2829 (1998).

[5] 17 U.S.C. § 304; Pub. L. No. 105-298, Title I, § 102(d)(1) 103, 112 Stat. 2829, 2827 (1998).

[6] Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790).

I. THE POWER OF CONGRESS TO EXTEND THE TERM OF COPYRIGHT INDEFINITELY IS LIMITED BY THE COPYRIGHT CLAUSE.

Analysis of the extent and nature of Congress's power to enact copyright legislation must begin with the relevant constitutional language. Under Article I, Section 8, clause 8 of the Constitution (the "Copyright Clause"), "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This Court has recognized that the Copyright Clause grants Congress power to grant copyright protection and also sets a substantive limit on that congressional power.[7]

While no definitive term of protection is established in the Copyright Clause, its "limited Times" language denies Congress unfettered discretion when setting copyright terms. This Court would not permit Congress to establish or extend the copyright term indefinitely, or presumably even for a thousand years, through a single legislative act.[8] Nevertheless, the lower courts have concluded that Congress can incrementally extend the copyright term virtually forever as long as each extension is of finite duration, thereby permitting Congress to accomplish indirectly that which it could not accomplish directly.[9] The notion that a *de facto* perpetual

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[7] *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) ("The clause is both a grant of power and a limitation.").

[8] M. Nimmer and D. Nimmer, NIMMER ON COPYRIGHT, § 1. 05[A][1] (2001).

[9] The district court below concluded that Congress can extend the term of copyright protection without limit, provided that it does so on an incremental basis. *Eldred v. Reno*, 74 F. Supp. 2d 1, 3 n.7 (D.D.C. 1999), *aff'd* 239 F.3d 372 (D.C. Cir. 2001) ("Within the discretion of Congress, any fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time then it remains a limited time.").

copyright term is sanctioned by the Constitution as long as each individual extension is of limited duration seems inherently flawed and unable to withstand scrutiny in light of the balanced need for a rich and vibrant public domain and the plain language of the Copyright Clause itself. The public's growing demand for public domain content, made possible by digital technologies, underscores the need for this balance.

II. THE COPYRIGHT CLAUSE ESTABLISHES A BALANCE BETWEEN INCENTIVES FOR CREATORS AND PUBLIC ACCESS TO THE FRUITS OF CREATION.

The careful language of the Copyright Clause balances the rights of creators and copyright owners against the public benefits provided by unrestricted access to creative works. By providing the incentives of control and the opportunity to profit, copyright protection motivates authors and artists to create original works, which benefit both the creator and society at large.[10] At the same time, the framers recognized the long-term public benefit of eventual unrestricted public access to these creative works. As this Court has long recognized, the framers ensured that the benefits of creativity and innovation would, in due course, become freely available to the general public by way of a constantly refreshed public domain.[11]

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[10] *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("[T]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

[11] *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expressions for the good of the public."); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991)

The framers recognized that a public domain with an ever-refreshed wealth of creative works is essential to promote the progress of science.[12] Public domain material often serves as the spark for and the foundation of new creative works and efforts, as others borrow, expand, and build upon public domain materials to give the original expression of others new life. Many of the most popular movies, literary works, and theatrical works draw from original expression that is in the public domain. Digital technologies make locating, expanding, and building on the creative works of those who went before easier and more promising than ever. The public domain also increases the likelihood of the preservation of materials that otherwise would be lost or forgotten by private owners after exploitation ceases to be sufficiently profitable. This is particularly true today, where digital computing,

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("The primary objective of copyright is not to reward the labor of authors but to 'promote the Progress of Science and useful Arts.'"); *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984) ("Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright term required by the Constitution, reflects a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts."); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

[12] Contrary to today's meanings, in the vernacular of the framers, the word "science" referred to the works produced by authors, while the term "useful arts" referred to the work of inventors. NIMMER, *supra* note 8, at § 1.03[A] n.1.

networking, and communications technologies allow each member of the public to become a custodian of information in the public domain, thereby increasing the likelihood that the information will not only be preserved, but also shared and built upon. The framers embraced the principle, long recognized by scholars and innovators, that in the march of human progress, the creative efforts of prior generations are a legacy to future generations. [13] The Copyright Clause establishes the public domain as the means of transmitting this important legacy, and today's digital computing, networking, and communications technologies provide historic opportunities to realize and further the framers' vision.

III. EXCESSIVE COPYRIGHT TERMS MAY SLOW THE DEVELOPMENT OF TECHNOLOGIES THAT PROVIDE ACCESS TO BOTH THE PUBLIC DOMAIN AND COPYRIGHTED WORKS.

As a major provider of the building blocks for personal computers, the Internet, and other digital technologies, Intel is dedicated to expanding legitimate and lawful access to and enjoyment of a wide range of content, including both copyrighted and public domain material. Intel manufactures the tools and the basic building blocks of the networks that (i) allow all users to access, share, and distribute public domain and other information and (ii) enable content providers to deliver and consumers to enjoy new digital goods and services. Intel also invents ways to improve the speed and

[13] "If I have seen further . . . it is by standing on the shoulders of giants." Letter from Sir Isaac Newton to Robert Hooke (February 5, 1675/1676), *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 313 (Emily Morrison Beck ed., Little, Brown & Co. 1980) (1855). *See also* Zechariah Chafee, *Reflections on Copyright Law*, 45 COLUM. L. REV. 503, 511 (1945).

reliability of connections and expand the reach of the network. Working with content creators, consumers, and service providers, Intel focuses on the build-out [14] of increasingly sophisticated networks to make universal and economical delivery of and access to all forms of content possible.

There is, however, a symbiotic relationship between the development and deployment of digital computing, networking, and communications technologies and the wealth and robustness of the content that people are able to access, communicate, and use. Consumers rely on the digital technologies created by Intel and other companies to gain access to and use content in new and compelling ways. At the same time, the continued viability and expansion of these technologies depend on readily available content that is of potential use and relevance to the public.

For example, digital technologies have created both tremendous opportunities and challenges with respect to the creation, delivery, and consumption of commercial entertainment content, which promise to speed the rate of innovation and network build-out. In this context, the real and substantial threat of digital piracy has led to the development and deployment of technologies that protect copyrighted works to preserve the incentive for artists to create those works. Intel decries piracy, and has worked for the past six years with content providers and other interested parties to improve and disseminate technologies that facilitate protected distribution of valuable copyrighted works while enabling new and inventive ways for consumers to lawfully enjoy and use them. Intel remains committed to this challenge and the development of next-generation technologies that will lead to even more diverse and creative digital product offerings and even greater consumer flexibility.

[14] "Build-out" of computing networks refers to the deployment and expansion of such networks.

A healthy and vibrant public domain is also necessary to speed the rate of technological innovation and network build-out, as it provides a rich archive of materials that can be shared and distributed by all without restriction. The value of works in the public domain thus has become increasingly important to the development and deployment of creative next-generation digital technologies and tools. New technologies that can be applied to public domain content in unrestricted ways will ultimately benefit both new and existing content creators and content consumers. Development and innovation during the Information Revolution will flourish when there is reasonable access to public domain content that can be used in any and all creative ways, without restriction and without harm to the artist, author, or proprietor who is no longer living or who has already benefited from the work. In this context, the more robust the public domain, the more robust the discourse, the communication, and the interaction with creative and informational material.

In these very real ways, the growth of digital technologies and the promise of improved communications tools directly benefit from the continued vitality and growth of the public domain. If the public domain—material that is available to all on an unrestricted basis—steadily decreases in value due to the lack of new material, the need and demand for a full range of new technologies and innovation will also decline. One cannot exist without the other. From its unique vantage point, Intel has observed continued evidence of what the framers knew over 200 years ago—that the continued growth and vitality of the public domain is essential to the promotion of science, the arts, and creative effort.

IV. DIGITAL TECHNOLOGY PRESENTS AN HISTORIC OPPORTUNITY FOR THE FUTURE OF THE PUBLIC DOMAIN.

More than ever before, developing, accessing, using, and nurturing a living and vibrant public domain, one that is truly "public," has real meaning. The open source movement [15] demonstrates both the demand for and benefits of software and other information being freely available or otherwise coming into a rich public arena. Connected and distributed digital computing, networking, and communications technologies are bringing exponential storage, computing, and communications power to the public domain and its users. The rapid growth of these movements and technologies demonstrates the unprecedented demand for information and content of all kinds, and underscores the need to ensure the continual and steady flow of content into the public domain. The opportunity for a real public domain facilitated by digital technologies is of historic proportion. Indeed, there is large and growing body of creative works, whose artists have long slept and whose proprietors long ago enjoyed the fruits thereof, that are waiting for the promise of rebirth in the public domain as envisioned by the framers. The framers well understood that these creations are ultimately the foundation of future progress and belong to and benefit us all in time when they enter the public domain.

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[15] *See* note 3, *supra*.

CONCLUSION

Intel offers no opinion on whether this Court should reverse or affirm the decision of the court below, but respectfully requests that the Court provide critical and meaningful instruction to both Congress and future courts that recognizes the balance and limitations that the framers established in the Copyright Clause, and the literal and growing importance of the public domain in that balance. Such review and instruction by this Court is essential to the continued development of new computing, networking, and communications technologies, the promotion of progress and learning, and adherence to constitutional principles.

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